U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue date: 25Jul2002

CASE NO.: 2002-LHC-89

OWCP NO.: 07-155409

IN THE MATTER OF:

MICHAEL MCCLURE,

Claimant

v.

AVONDALE INDUSTRIES,

Employer

APPEARANCES:

Gregory S. Unger, ESQ.

For The Claimant

Christopher M. Landry, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Michael McClure (Claimant) against Avondale Industries (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 10, 2002, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 35 exhibits, and

Employer proffered 18 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record. [1]

Post-hearing briefs were received from the Claimant on June 18, 2002, and from the Employer on June 13, 2002. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on December 27, 1999.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on December 27, 1999.

5. That Employer filed Notices of Controversion on January 31, 2000, February 23, 2000 and September 10, 2001.

6. That an informal conference before the District Director was held on September 5, 2000.

7. That Claimant received temporary total disability benefits from December 27, 1999 to September 11, 2001.

8. That Claimant's average weekly wage at the time of injury was $553.60.

9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-____.

The unresolved issues presented by the parties are:

1. Causation of Claimant's knee injury and depression.

2. The extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Entitlement to indemnity and medical benefits.

5. Entitlement to Section 10(f) adjustment.

6. The effect of the May 9, 2001 Order.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant is 31 years old, has an eighth grade education, and can read and write a little. He failed the ninth grade three or four times before dropping out. His work experience includes shipfitting, welding, sandblasting and painting. (Tr. 31-32). Claimant testified he worked as a painter and sandblaster for Employer on December 27, 1999, when he slipped on the greasy dry dock, fell and hit the right side of his lower back. (Tr. 19-21). He immediately contacted his supervisor, who gave him a pass to go to First Aid. Claimant experienced pain in his right lower back and felt he could not return to work. He saw Dr. Mabey the following day, December 28, 1999, who prescribed anti-inflammatory pills and released Claimant back to his usual job. (Tr. 21-23). Claimant went to Dr. Stuart Phillips for a second opinion, who took him off of work and became Claimant's treating physician. (Tr. 23).

Claimant testified his pain began on the right side of his lower back, but spread to the left side within two weeks of the accident. The pain was sharp and constant, originating in his lower back and radiating down his legs. He also complained to Dr. Phillips of numbness and weakness in his legs. (Tr. 24). In October 2000, Claimant's right knee gave out from such weakness and Dr. Phillips took x-rays and prescribed a knee brace. Claimant stated Employer refused to pay for the x-rays and the brace, asserting his knee injury was unrelated to his back

injury. (Tr. 25-26).

In addition to his back and right knee pains, Claimant testified his work accident caused him liver problems because the stress and frustration of not being paid workmen's compensation led him to drink excessive amounts of alcohol. Claimant has had alcohol abuse problems for the past sixteen years, but testified he got his life in order the year before his work accident and injury. (Tr. 27-28). He is now in a support group that meets weekly and is trying to change his life.

However, Claimant admitted he was arrested March 30, 2002, for disturbing the peace. He testified this was a result of the accident, which caused him to drink and thus become violent. (Tr. 28, 30). On cross-examination, he stated he is a Code 6 repeat offender for his anger problems and has been arrested too many times to count for fighting, battery and disturbing the peace. He was arrested in October and November 2001 for domestic violence, which he attributes to the frustrations of not being able to support his family. (Tr. 42-43).

Dr. Phillips prescribed Vicodin and Flexeril for Claimant, which he takes three times a day. The medication relieves his pain "a little," but causes him to become drowsy. As a result, he cannot drive and sleeps during the day while remaining awake at night. (Tr. 28-30). On cross-examination, Claimant was unclear how often he takes his medication. He first testified he only takes it "as needed," but later stated he takes his medication every day. (Tr. 34-35). Claimant then verified he takes his medication every day. (Tr. 36).

On cross-examination, Claimant testified he drinks alcohol only when he "slips" and smokes marijuana once a week "to calm his nerves." (Tr. 33-34). He has used crack-cocaine in the past, the last occasion was three months before the hearing. Claimant stated he started using illicit drugs about 1987, when he was 16 years old, and he knows they are illegal. (Tr. 38-39). He testified he neither smokes nor drinks while taking his medication. However, he later stated he has not recently smoked or drank while on his medication and he cannot remember the last time he did so. (Tr. 34, 40). Claimant had been drinking when he was arrested in March 2002, but he did not take his medication that day. (Tr. 41).

Throughout his cross-examination, Claimant maintained Dr. Phillips has not released him to return to work in any capacity. However, Claimant testified he saw an August 31, 2001 letter from his insurance adjuster and Dr. Phillips' June 21, 2001 medical report, and that both stated he could return to work with

Employer under certain restrictions. Nonetheless, Claimant asserted Dr. Phillips never told him he could return to work. (Tr. 44-46). On re-direct examination, Claimant testified the June 21, 2001 medical report stated he was permanently and totally disabled from heavy manual labor and needed to be retrained for a job that did not require repeated lifting, stooping or bending. Claimant stated since Employer had not offered to retrain him for such a position, he was under the belief he had not been released to work. (Tr. 53-54).

Claimant testified he was aware Employer had a suitable job within his restrictions available for him, but he did not report to work because his doctor had not released him and he was under the influence of narcotics. (Tr. 46). He stated he would not want to return to Employer until his benefits had been paid, but he later stated he would be willing to return to Employer, if released. Claimant has no problems with going back to work, but reiterated he is presently unable to do so because of his mental and physical condition. (Tr. 46, 50-51).

Claimant also testified he was in a motor vehicle accident on December 6, 2001. He told Dr. Phillips he was "shook up," but denied experiencing increased pain in his back. Claimant filed a lawsuit involving that accident, which was settled for $800-$1200. (Tr. 48-49).

Claimant stated the current situation has been emotionally difficult on him, and he feels his physical and mental state render him incapable of returning to work for Employer in any capacity. (Tr. 31). Since Employer stopped paying compensation, he has lost his apartment and moved in with his parents, who he states cannot afford to support him. Additionally, Claimant is unable to fulfill his child support payments. (Tr. 18, 55).

At the hearing, Claimant frequently alternated between sitting and standing to relieve his back pain. He wore a back brace which he said Dr. Mabey had given him but had not prescribed. It does not help his pain much but he uses it on very bad days, which can be as often as 4 to 5 times per week. Claimant also uses a cane which was not prescribed. (Tr. 54-56). Dr. Phillips has not recommended back surgery for Claimant, and Claimant said he was scared of undergoing any surgery. (Tr. 57-58).

Mr. John Stephen Scianna

Mr. Scianna is the section manager for Employer's safety department. He is in charge of safety for the Ingalls and

Avondale facilities, managing the day-to-day operations of the safety department and monitoring OSHA compliance. He was appointed to this position in February 2002, but for two years prior to that he was the medical services administrator for the Employer's medical facility. He was at this position in September 2001. (Tr. 85).

Mr. Scianna's duties as medical services administrator included managing the return-to-work program. He testified when an employee returns from a long-term injury or illness the Employer's medical services administrator, worker's compensation administrator and a representative from the risk management group present a request, on behalf of the employee, to a committee comprised of all the manufacturing vice-presidents and their staffs. (Tr. 86-87). The committee reviews and discusses the employee's restrictions, and is requested to find suitable employment in the worker's original craft that meets the physical restrictions. Before a vice- president extends a job to the returning employee, the vice- president of production ensures the specific restrictions are fully understood. (Tr. 89). If there is an appropriate job available, the worker will be approved to return to work. (Tr. 86).

Mr. Scianna testified he presented Claimant's return-to-work request to the committee in August 2001. At the end of the meeting, it was his understanding that a job in the paint department assembling blast hoods was available for Claimant. This position is in Claimant's previous department and meets his restrictions. (Tr. 86-87, 91). According to Mr. Scianna, the position is still available but he could not speculate as to future availability. He stated on cross-examination that the position would be available to Claimant even if he had been terminated. (Tr. 93-95).

After Claimant was approved to return to work, Mr. Scianna generated a temporary work restriction form (also used for return-to-work from long-term injuries) as a preliminary measure to ensure there would be no hurdles or delays in Claimant's return. The form was processed through the paint department to ensure the job was available and met Claimant's restrictions. (Tr. 87-88). On cross-examination, Mr. Scianna admitted he did not know how much the job pays, but testified it is a full time position. (Tr. 96-97).

Mr. Scianna stated the effect of an employee's use of narcotic medication would be evaluated on a case-by-case basis. Determinative factors include the nature and sensitivity of the job and an evaluation by Employer's medical personnel. Such

evaluation is conducted after the employee actually appears to return to work. Employer does not preclude an employee from returning to work because they are taking medication. (Tr. 87, 92-93).

Mr. Glenn Clement

Mr. Clement is the superintendent in Employer's .01 paint department, and has held this position for 18 years. He is familiar with the position of blast hood and paint swab assembler because he is in charge of that position. He assisted putting together the job description in EX-14, and testified the description is accurate. He testified the job is available for Claimant. (Tr. 98-99).

Mr. Clement testified blast hood and paint swab assemblers are necessary for the operations of the paint department. On cross-examination, he stated the job used to be reserved for employees nearing the age of retirement, but now is used as a "worker's compensation program." There are 564 workers in the paint department, and a minimum of 5 work at this particular position, although it can accommodate as many workers as necessary. (Tr. 103-105). The blast hood assemblers re-attach clean blast shields to the hoods, and when they finish they make paint swabs. There are a variety of duties, such as making blast whips and operating fork lifts, that workers in this position may do depending on their restrictions. Mr. Clement testified he constantly keeps paint swabs and blast hoods in inventory and has never reached a point where he didn't need the workers anymore. (Tr. 105-108).

Mr. Clement testified the position of blast hood and paint swab assembler requires no special training other than on-the-job demonstrations. It requires no lifting or carrying, and the employee may alternate between sitting and standing, as needed. There is no minimum production requirement, and the workers can choose to become as involved in the department as they desire. Furthermore, return-to-work employees are paid the same rate they were earning when they left. (Tr. 100-102).

The Medical Evidence

Joseph F. Mabey, M.D.

Dr. Mabey first examined Claimant on December 28, 1999, at Employer's Safety Department. He noted that on December 27, 1999, following his accident, Claimant walked over 200 feet to the Medical Department and presented with no external signs of

trauma and lumbar mobility was at full range. Nonetheless, the medic on duty sent Claimant home and told him to return the next day to see Dr. Mabey. (EX-2, pp. 1-2).

Claimant reported to Dr. Mabey he had a slip and fall in which he landed on his right lower back and thigh. He stated he could not get out of bed that morning. Dr. Mabey noted there were no signs of external trauma, and only limited lumbar mobility. He felt Claimant had symptom magnification. He recommended daily physiotherapy exercises, a lumbar harness and a prescription for Naprosyn. (EX-2, p. 2).

Dr. Mabey examined Claimant again on January 4, 2000, at which time Claimant presented with pain in the left side of his back, asserting his right side improved. Dr. Mabey reported Claimant had normal lumbar mobility and full painless hip and knee mobility. He resisted a straight leg raising test on the left, claiming it was "just like the last time but it was on the right." X-rays showed no abnormality, but Dr. Mabey advised Claimant to restrict heavy lifting and frequent bending. These accommodations could not be met within his job duties, and Claimant was placed on lost time. (EX-2, p. 2).

Claimant returned for his scheduled follow-up on January 11, 2000, at which time another doctor did the evaluation. Claimant presented with pain in his right leg on this date, stating the pain in his left leg had resolved itself. Claimant had no problem getting on and off the table or with heel-toe ambulation and a neurological examination were both normal. There was no evidence of muscle spasm and bilateral straight leg raising tests were to 90 degrees with only slight pain at full extension. Dr. Mabey reviewed this report, concluded it was a negative examination and diagnosed Claimant with an alleged sprain and a contusion right lumbar back and thigh, with varying symptomology. Claimant sought a second opinion from Dr. Phillips. (EX-2, pp. 2-3).

Stuart I. Phillips, M.D.

Dr. Phillips, a board-certified orthopedic surgeon, testified by deposition on March 27, 2002. (EX-17). He first examined Claimant on January 17, 2000, three weeks after his accident. Claimant reported to Dr. Phillips he had slipped on some grease at work and fell and hit his lower back and hip. He suffered immediate soreness in his back and right leg which persisted, but later switched from his right to left leg and radiated down his leg. (EX-17, p. 6). Claimant told Dr. Phillips he has a ninth grade education and his job as

sandblaster and painter required him to sit, stand, walk and lift 30-60 pounds. (CX-2, pp. 18-19).

Claimant presented to Dr. Phillips with constant moderate low back pain which radiated into both of his legs, hips, thighs and feet. The pain was more severe in his left leg, which suffered from numbness, tingling and intermittent weakness. He did not complain of any knee injury or pain. (EX-17, p. 43). Claimant had no history of back or neck injuries and denied cervical problems, though he did have occasional headaches and difficulty sleeping. Claimant told Dr. Phillips he had no history of drug or alcohol abuse, or psychological treatment. (CX-2, p. 19).

Dr. Phillips conducted a physical examination of Claimant, noting he walked with a mild antalgic gait. The lumbar exam was abnormal, revealing a 50% loss of lumbar motion and mild to moderate muscle spasm. Claimant also had moderate tenderness at the lumbosacral level into the left sacroiliac joint and a loss of lumbar lordosis. A straight leg raising test was abnormal on the left side for back, hip and leg pain, and the right side was positive for back pain. Deep tendon reflexes in Claimant's lower extremities were 2+ and equal bilaterally. Dr. Phillips noted Claimant had good motor skills, equal calf sizes and sensations were normal to light touch. (CX-2, p. 19). X-rays of Claimant's lumbar spine revealed diminution of the lumbosacral joint, but no acute fractures or dislocations. Dr. Phillips observed Claimant's right pelvis joint was lower than his left. There were early degenerative changes present in the sacroiliac joints but not in the hip joints. (CX-2, p. 19).

Dr. Phillips concluded that Claimant had twisted and injured his back in a slip and fall accident at work. (CX-2, p. 19). He testified his original impression was Claimant had a sacroiliac strain, not a lumbar herniated disc, but in his report he stated Claimant had all the "hallmarks of SI lumbar radiculitis, probably from a herniated lumbar disc." (EX-17, p. 9; CX-2, p. 19). It was too soon to image Claimant, so Dr. Phillips prescribed three weeks of physical therapy, corset support, anti-inflammatory medication and pain relievers. He restricted Claimant from returning to work. (CX-2, p. 19).

Claimant returned to Dr. Phillips on February 8, 2000. He reported some improvement with physical therapy, but not much. He still suffered from tenderness, spasm and limited motion in his lumbar spine. A straight leg raising test was positive, but a neurological examination in the lower extremities was negative. Dr. Phillips noted Claimant had not gotten well in six weeks of

conservative therapy, so he ordered a lumbar MRI and continued Claimant on physical therapy and medication. He diagnosed Claimant with lumbar disc displacement, and reported Claimant was temporarily totally disabled. (CX-2, p. 16).

Claimant returned for a follow-up visit on June 13, 2000, and was examined by Dr. Adatto in Dr. Phillips' absence. Dr. Adatto noted Claimant reported he had been denied medical care and payment for his doctor's visits, and he was financially unable to see his doctor before this date. Claimant presented with continued low back pain and reported his leg pain was still bothering him, but was less with his sedentary life-style. Claimant had not sustained any new accidents, injuries or illnesses. (CX-2, p. 14). A physical exam of his lumbar spine indicated tenderness at the L4 and lumbosacral levels as well as mild to moderate paralumbar muscle spasm. Claimant had a limited range of motion in his lumbar spine, and a straight leg raising test was positive in both the sitting and recumbent positions. X-rays showed five atypical lumbar vertebrae and mild disc space narrowing at the L4-5 level, but no acute fractures or dislocations. (CX-2, p. 14).

Dr. Adatto noted Claimant's subjective complaints were consistent with the objective clinical findings. Considering Claimant was still experiencing pain six months post-injury, he re-ordered the lumbar MRI and refilled Claimant's prescriptions. He diagnosed Claimant with lumbar syndrome, rule out lumbar disc derangement and/or herniation. Dr. Adatto stated Claimant is temporarily totally disabled from June 13, 2000 through September 13, 2000. (CX-2, p. 14).

Claimant returned to Dr. Phillips on August 22, 2000. He reported persistent back and leg pain, which had improved slightly over the past few months. Dr. Phillips noted Claimant suffered tenderness at the L4-5 level, pain, spasms and restricted motion. A straight leg raising test was positive on the left side only in both the sitting and recumbent positions. An MRI taken August 10, 2000, showed a modic type II-b L4-5 posterior disc herniation. This correlated with Claimant's subjective complaints and the objective clinical findings. (CX-2, pp. 10, 37).

Dr. Phillips stated Claimant had been denied adequate conservative care. Three weeks of physical therapy was too short to tell if it was benefitting Claimant, so he re-issued a slip for six weeks of physical therapy. The closer Claimant got to one year post-injury, the less likely he was to get well. Dr. Phillips reported Claimant's prognosis was guarded, and he may require surgery. He classified Claimant as temporarily totally

disabled through October 22, 2000, noting that Claimant "was not capable of returning to his previous occupation at the present time." (CX-2, p. 10). Dr. Phillips clarified in deposition that by temporarily totally disabled he meant Claimant was unable to return to his former occupation of sandblaster and painter. (EX-17, pp. 10-11).

Dr. Phillips testified he examined Claimant on October 17, 2000, at which time Claimant complained of right knee pain for the first time. He told Dr. Phillips his right knee had given way and he fell and landed on it. (EX-17, p. 11). Dr. Phillips testified he related Claimant's weak and intermittently numb legs to his back injury, but Claimant did not tell him his weak legs caused his fall. (EX-17, p. 44). Dr. Phillips stated it was more probable than not that the knee injury was unrelated to Claimant's back injury/accident. (EX-17, pp. 12, 19). However, on cross-examination, he stated Claimant's weak legs could have caused him to fall and injure his knee. (EX-17, pp. 39-40). He opined that a herniated disc does not cause a knee to go out. (EX-17, p. 43). Dr. Phillips further testified either a bad back or a bad knee could have caused the fall. (EX-17, p. 44).

Claimant visited Dr. Phillips on November 16, 2000, and presented with continued right knee pain, swelling and giving way, as well as low back and leg pains. He denied any new injuries or illnesses. A physical examination of the right knee indicated abnormalities including hyper-mobility of the patella, crepitus, pain and instability; a McMurray's test was negative. Claimant's lumbar spine continued to be abnormal with tenderness, pain, limited mobility, moderate paralumbar spasms and disc herniation. Dr. Phillips testified he was treating Claimant conservatively and prescribed a patella stabilizing knee brace, physical therapy for the lumbar spine and right knee and refilled Claimant's medications. (EX-17, pp. 13-14; CX-2, p. 9). Based on Claimant's back injury, Dr. Phillips labeled Claimant temporarily totally disabled from his job as a sandblaster. (EX-17, p. 14).

Claimant experienced more administrative problems, and was not able to follow up with Dr. Phillips until March 27, 2001. He complained of persistent low back pain, and pain and weakness in his right knee, along with a feeling of "giving way." (EX-17, p. 48). He was avoiding activities that exacerbated the pain, but had difficulty going up and down stairs as well as with prolonged standing. Dr. Phillips maintained his diagnosis of Claimant's disc injury at L4-5 and stated Claimant had a bad knee with subluxation of the patella and patellofemoral chondromalacia. These knee injuries were both "potentially worse in that of a painter/sandblaster that has to climb and stand and lift heavy

weights." Dr. Phillips recommended a vigorous rehabilitation program and testified Claimant could not return to heavy manual labor as of March 2001, but that he should be vocationally rehabilitated and retrained. Claimant was not considered to be an operative candidate. (EX-17, pp. 17-18, 48). Dr. Phillips testified that Claimant's knee injury occurred later than his back injury and he did not know if it was related or not to his back injury, but he had to treat the whole patient. (EX-17, pp. 19-20).

Claimant visited Dr. Phillips on May 22, 2001, at which time he presented continuing persistent low back and knee pains. Dr. Phillips gave Claimant an injection of Depo-Medrol and Xylocaine into the muscles surrounding the L5 level for relief of pain and inflammation. (EX-17, p. 49).

At his June 21, 2001 visit with Dr. Phillips, Claimant presented with continuing symptoms of pain, tenderness, limited motion and spasm in his lumbar spine. Dr. Phillips opined a spontaneous regression was unlikely, as Claimant was more than a year post-injury. (CX-2, p. 6). He did not believe Claimant was a candidate for invasive testing or surgery. He determined Claimant was permanently totally disabled from heavy manual labor, and needed to be retrained for a job that did not require repetitive bending, stooping and lifting more than 20 pounds, which were permanent restrictions. (CX-2, pp. 6, 23). At his deposition, Dr. Phillips clarified total permanent disability did not mean Claimant could not do <u>anything</u>, just that Claimant could not do his previous work. (EX-17, p. 20). If Avondale had a position that fit within his restrictions, such a job would be appropriate for Claimant. (EX-17, pp. 17-18). The restrictions assigned in June 2001 remain the same to the present. (EX-17, p. 23).

Dr. Phillips saw Claimant again on September 13, 2001 and December 6, 2001. (CX-2, p. 2; EX-17, p. 50). At both visits Claimant reported continued low back pain and leg pain, and Dr. Phillips maintained his diagnosis and opinions. Despite adequate rehabilitation efforts, Claimant had no relief and was not able to return to work as a sandblaster and painter. Dr. Phillips noted prolonged standing, walking and repetitive stooping, bending and lifting increased Claimant's pain. The December 6, 2001 report mentions Claimant did not want surgery, but Dr. Phillips testified he never recommended surgery to Claimant, nor was such recommendation included in the report. (CX-2, p. 2; EX-17, p. 14). Claimant told Dr. Phillips he had been in a motor vehicle accident in December 2001, but denied any increase in pain or new symptoms and also denied psychiatric problems. (EX-17, pp. 29-30). His permanent total disability from heavy manual

labor continued, and Dr. Phillips reported Claimant takes hydrocodone, a narcotic, for pain and should not operate heavy machinery while on the medication. He testified Claimant uses a cane for stability and episodes of leg weakness, but he did not prescribe the cane. (CX-2, p. 2; EX-17, p. 26). During the December 2001 exam, Dr. Phillips inquired about and Claimant denied any new muscular skeletal pain, neurological complaints or dysfunction, psychiatric problems or gastrointestinal problems from his last exam. (EX-17, pp. 29-30, 34-35).

Dr. Phillips' latest records were of Claimant's February 28, 2002 visit at which time he presented with continuing lumbar and right knee pain. A neurological exam of the lower extremities indicated lumbar nerve root irritation, and there was a loss of sensation in the fifth lumbar dermatome. Claimant also suffered patellofemoral crepitus and instability in the right knee, as well as free fluid within the joint. Dr. Phillips continued Claimant's permanent total disability status, recommending he only perform sedentary tasks for short periods of time. His knee injury would keep him from walking, climbing and kneeling while his back injury would prevent him from sitting or standing for long, bending, lifting and stooping. Dr. Phillips refilled Claimant's medications and reported he will see Claimant every three months. (CX-2, p. 1).

Dr. Phillips testified Claimant reached MMI as of December 6, 2001, when he decided Claimant did not need surgery. (EX-17, p. 42). He has never referred Claimant to a psychiatrist or psychologist for treatment. (EX-17, pp. 33-34). He deferred to a vocational expert's opinion whether a job is appropriate for Claimant. (EX-17, p. 33).

Ralph P. Katz, M.D.

Employer referred Claimant to Dr. Katz who examined Claimant on January 19, 2000. (CX-3, p. 3). Dr. Katz noted Claimant was a sandblaster and painter who on December 27, 1999, slipped and fell on the right side of his buttocks and his right hip. Claimant was sent home that night, but the next day Dr. Mabey returned him to full duty. One week later Claimant's back pain persisted and had radiated into his left leg, although his right leg pain had subsided. He was restricted to light duty. Claimant reported he had seen Dr. Phillips who placed him on physical therapy, Vicodin and Flexeril. (CX-3, p. 4).

Dr. Katz reported Claimant presented with low back pain and pain in the posterior left buttock radiating down to the calf. There was no tingling or numbness in Claimant's left foot. The pain was worse with sitting and standing too long as well as with

motion, but subsided when Claimant laid down. Claimant had no prior injury to his lower back or lower extremities. (CX-3, p. 4). The initial complaint form which Claimant filled out indicated he complained of severe sharp and tingling left leg pain. He experienced stiffness and intermittent numbness, with weakness standing up and some difficulty walking. He also reported lower back pain with sitting. Claimant's symptoms occurred walking, rising from chairs, sitting in and getting in and out of cars and at night. (CX-3, p. 10).

Dr. Katz performed a physical examination of Claimant, at which time he noted Claimant was a pleasant gentleman in no acute distress. Claimant had normal lordosis of the lumbar spine, no tenderness in the midline but diffuse pain across the lower lumbar spine. Dr. Katz did not note any spasm, but stated Claimant experienced pain with forward flexion, extension and rotation. Claimant's motor strength was 5/5 throughout the lower extremities, there were no tension signs and sensation was grossly intact to light touch. A straight leg raising test was positive in the sitting, but not supine, position. X-rays of Claimant's back showed no fractures or dislocations, but revealed some mild degenerative changes at "the 5-1 level," with minimal joint space narrowing at "the 4-5 level." (CX-3, p. 5).

Dr. Katz diagnosed Claimant with mechanical low back pain and mild sciatica in the lower extremities with no radiculopathy. He agreed with Dr. Phillips' three-week physical therapy regime, and recommended Claimant be clinically reassessed at that time to determine if he is able to return to work. Dr. Katz hoped Claimant would be able to return to full duty without restriction. (CX-3, p. 5).

Henry R. Nuss, P.T.

Therapist Nuss saw Claimant on nine occasions between January 20, 2000 and February 8, 2000, on referral from Dr. Phillips. He stated Claimant had a history of a slip and fall accident at work on December 27, 1999. At the initial visit, Claimant complained of moderate lower back pain, left leg pain and pain into the left hip. Mr. Nuss noted Claimant had flat back posture, limited range of motion and intermittent numbness into the left leg. A straight leg raising test in the supine position was positive for low back pain and leg pain, and the sitting flip test was positive on the right for contralateral low back pain. (CX-4, p. 6).

The physical therapy regimen Mr. Nuss provided included moist heat and electricgalvanic stimulation for inflammation and

pain management, ultrasound, education in spinal care and therapeutic exercises. The goal of such treatment was to reduce pain and increase range of motion, strength and stability in Claimant's spine. (CX-4, p. 6).

Mr. Nuss reported on February 8, 2000, that Claimant had favorable progress. Claimant subjectively expressed improvement in his lower back, ranking the pain a 6 out of 10. He filled out an Owestry Self-Assessment Questionnaire, finding himself at 55% functional disability. Claimant had continued complaints of low back pain when bending, sitting for long periods of time and pain radiating into his left posterior leg. Objectively, Claimant had limited range of motion, although it had improved "a little." A supine straight leg raising test was positive on the right for low back and leg pain, and positive on the left for sciatica. There were also indications of paralumbar tenderness. Mr. Nuss felt Claimant may benefit from continued physical therapy. (CX-4, p. 8).

George A. Murphy, M.D.

The Department of Labor referred Claimant to Dr. Murphy for an independent medical examination on July 17, 2000. (CX-5, p. 9). The Department of Labor requested Dr. Murphy to diagnose Claimant and opine as to the extent of his disability or capability to return to work. (CX-5, p. 10). At the examination, Claimant presented chief complaints of contusions to his right lower back and right thigh, which he sustained in a slip and fall accident at work on December 27, 1999. He developed low back pain, initial numbness in his leg and occasional sharp pain and weakness in his leg. Claimant initially suffered the pains in his right leg, although it occasionally traveled to the left leg. Claimant told Dr. Murphy he had three weeks of physical therapy and some x-rays, but no other testing or treatment. (CX-5, pp. 13-14).

A physical examination revealed Claimant had a slightly limited range of motion. A straight leg raising test was tight bilaterally, but on the left more than the right. Neurological was grossly intact. Dr. Murphy stated an MRI was needed for further diagnosis of Claimant's back problems, stating it should have been done months earlier. Additional recommendations could be made on the results of the scan. (CX-5, p. 14).

B. Sheppard, M.D.

Dr. Sheppard examined Claimant on January 8, 2001, at the Louisiana State University Medical Center Emergency Department.

Claimant presented with chronic low back pain and right knee pain. Dr. Sheppard prescribed Ultram and discharged Claimant to his home. An appointment at the Tulane Orthopedic General Clinic was scheduled for Claimant on March 3, 2001. (CX-6, p. 2).

West Jefferson Medical Center Reports

In the past, Claimant was admitted to the West Jefferson Medical Center (WJMC) on several occasions for depression, suicidal tendencies and substance abuse of alcohol and cocaine. (See EX-3). He first became depressed when he was 16 years old, following the murder of his brother. (EX-3, p. 264). He was hospitalized at Charity Hospital in 1985, 1987, 1988 and 1990 for mental illnesses. In May 1992, Claimant was admitted to West Jefferson Substance Abuse and transferred to West Jefferson Medical Center's psychiatric ward and chemical dependency unit. (EX-3, p. 76). His doctors noted he had a long history of noncompliance with treatment regimes, medication noncompliance and substance abuse. He was diagnosed with depression and substance abuse. Claimant was diagnosed with these same symptoms in July 1992. (EX-3, pp. 34, 160-163). In October 1994 Claimant was admitted to the WJMC psychiatric ward for treatment of depression and substance abuse. (EX-3, p. 253). He was diagnosed again in November 1995, with depression, schizophrenia and psychosis. (EX-3, p. 14).

Claimant also visited the WJMC Emergency Room on two occasions for injuries sustained in motor vehicle accidents. In October 1984, Claimant's cervical spine tested normal. (EX-3, pp. 3-5). In November 1996, his cervical spine again tested normal and his lumbar spine was also unremarkable. (EX-3, p. 19). Additionally, Claimant visited the WJMC Emergency Room on January 5, 2000 and February 23, 2000, for complaints of back and leg pain which he allegedly sustained at work. (EX-3, pp. 24, 29).

The Vocational Evidence

Mr. Todd Capielano

Mr. Capielano was tendered and accepted as an expert in the field of vocational rehabilitation. (Tr. 59). He has worked for the Department of Labor since May 2001, monitoring Employer's employees who return to work with physical restrictions. The Department of Labor in New Orleans set up a program with Employer to ensure employees returning to work after an injury are placed in suitable jobs within their physical restrictions. It is Mr. Capielano's job to monitor the employees for about eight weeks to

make sure they perform their duties within their physical limitations. (Tr. 60).

In the present matter, F.A. Richard & Associates (FARA) contacted the Department of Labor in a letter which included Dr. Phillips' medical report of June 21, 2001. The Department of Labor, in turn, contracted Mr. Capielano on September 5, 2001, to monitor Claimant's return to work. (Tr. 60, 74). Mr. Capielano was provided with Dr. Phillips' June 21, 2001 report which detailed Claimant's work restrictions. He contacted Claimant by a letter dated September 6, 2001, to inform him of his role as monitor. (Tr. 61-62).

Mr. Capielano met with Employer's medical director, Mr. Scianna, on September 7, 2001, to discuss Claimant's return and what type of job he might be assigned. He also talked with the paint waste storage facility supervisor, Mr. Emile Landry, about positions as a paint swab maker or blast hood assembler. He testified these jobs were possibilities for Claimant. (Tr. 63). On cross-examination, Mr. Capielano testified he was told positions similar to these may have been available. It was his understanding a job assembling paint swabs and blast hoods was still available. (Tr. 73).

Mr. Capielano stated he has monitored a return to work employee in this position before and, therefore, has detailed knowledge of the job description. In his previous case he met with the worker weekly, watched him perform his job, assessed the job and addressed the supervisor with any problems. He also met with the supervisor on a regular basis. After eight weeks all was going well and Mr. Capielano closed the case, declaring a successful return to work. (Tr. 64-65).

This was Mr. Capielano's plan for Claimant, since the position did not require any special training and was within Dr. Phillips' restrictions of light physical demands only. (Tr. 66-68). On cross-examination, he noted Dr. Phillips' report stated Claimant needed to be retrained for a less-physically demanding position, but Mr. Capielano had earlier stated this position only required on-the-job demonstrations, and no formal training. (Tr. 66, 75). Claimant would not have to operate any machinery, and break times would be flexible to accommodate his physical restrictions. Claimant would also be able to alternate between sitting and standing, as needed. He would be stationed at a work table assembling paint swabs, which resemble a cotton swab and weigh about one ounce, or blast hoods which are pieces of laminate attached to a paint shield or hood. (Tr. 69-70). The pace is not rushed but set by the worker, and lifting is under

five pounds. The extent of walking and carrying would be to retrieve the materials from one location and move them to the work table. (Tr. 71). The job tasks for this position are set forth in EX-14 which Mr. Capielano confirmed was an accurate description. (Tr. 67). Based on Claimant's work history, transferrable skills and restrictions, Mr. Capielano testified this job is appropriate for Claimant. (Tr. 72-73).

On cross-examination, Mr. Capielano stated this position fits within sedentary work restrictions at which Dr. Phillips placed Claimant on February 28, 2002. (TR. 80). He testified Claimant would be able to perform this job even while taking Vicodin, although it is something that would have to be addressed by Employer. He knew of other employees working for Employer who were not operating heavy machinery while on medication and working in a controlled environment, but did not know Employer's specific policies for such situations. (Tr. 80-82).

Mr. Capielano stated the ultimate goal of this Department of Labor program is to return employees to their usual trade, in Claimant's case this would be any paint-related position. The paint swab/blast hood assembler is a real job, not sheltered employment designed for injured employees and not otherwise available. (Tr. 66-67). He understood Dr. Phillips to have released Claimant to work with restrictions that have been the same since June 21, 2001, and remain the same currently. Based on those restrictions he felt Claimant could perform this job. (Tr. 67-68, 83). It is not Mr. Capielano's job to contact doctors with specific job descriptions for them to approve. However, he stated he has worked extensively with Dr. Phillips in the past, and the doctor defers to the opinion of vocational rehabilitation specialists as to the suitability of jobs within his outlined restrictions. (Tr. 81-82).

Mr. Capielano received a letter from Claimant's lawyer dated September 10, 2001, which stated he would not allow Claimant to return to work until he was released by Dr. Phillips. Claimant did not report to work as planned, and Mr. Capielano was unable to perform his monitoring duties. He met with Mr. Sciarra on December 7, 2001, and since there were no new developments he closed Claimant's file. (Tr. 72).

Mr. Michael Nebe

Mr. Nebe is a vocational rehabilitation counselor and was accepted as an expert in vocational rehabilitation. He works with FARA Healthcare Management, a division of FARA Inc., which administers Employer's worker's compensation programs. FARA

employs nurses and vocational rehabilitation specialists to provide case management services for the workmen's compensation program. (Tr. 111).

Mr. Nebe was assigned to Claimant's case on March 19, 2002. He visited Employer's work site on March 21, 2002, to review the job offered to Claimant in September 2001, blast hood assembler and paint swab maker, for compatibility with Dr. Phillips' restrictions. (Tr. 112). Mr. Nebe understands it is still available for Claimant. (Tr. 114-115). He was provided with Claimant's relevant medical records, including Dr. Phillips' report from June 21, 2001, and based his opinions on these records as well as Claimant's personnel records, which were also provided to him. (Tr. 113, 121).

Mr. Nebe met with Employer's new administrator of the medical department, as well as Mr. Clement, the paint department supervisor. He traveled to the job site and requested to see what exactly the Claimant would be doing. After watching blast hood assemblers and paint swab makers in action, he summarized the positions as duct-taping plastic laminate to a paint hood and wrapping cotton material around the end of a twelve inch metal rod. (Tr. 114-116). This is a real position, not sheltered employment, and an employee would be doing it even if the worker's compensation program did not exist. (Tr. 117).

Mr. Nebe testified this position met and exceeded all of Dr. Phillips' restrictions of no repeated lifting, bending, stooping or carrying more than 20 pounds. He assumed these restrictions were permanent in nature. (Tr. 116, 119-120). This position required no climbing, stooping, kneeling, squatting, balancing or crouching. No special training beyond on-the-job demonstration was necessary. Claimant could alternate between sitting and standing and pretty much do what he wanted as long as he did not play around. Additionally, the farthest he would have to walk would be ten to fifteen feet to get to the restroom, all materials are within reach, and lifting would be under five pounds. There was a scheduled 30-minute lunch, but workers could take as many breaks as needed, if they did not abuse the privilege. (Tr. 116-118).

Mr. Nebe also performed a labor market survey in New Orleans, including the Westbank, at FARA's request. (Tr. 118). He found a variety of jobs he thought would be appropriate for Claimant. An ID checker at Sam's Wholesale Club paid $5.50-$7 per hour and required Claimant to stand at the store entrance and check patrons' identification. A parking cashier with APCOA Parking at Armstrong Airport paid $6.30 per hour, and required Claimant to sit in a booth and collect money from drivers leaving

the parking garage. (Tr. 122). Vincent Guard Service had a variety of security guard positions available which would require Claimant to stand and patrol business entrances, or sit in a booth and patrol a designated area. These jobs were all available in March 2002, but Mr. Nebe also surveyed jobs available in June 2001. These jobs included a ticket taker at the Aquarium of the Americas which paid $5.15 per hour, a ticket taker at the Audubon Zoo paying $5.50 per hour and a parking cashier at $6 per hour. (Tr. 122-123).

Mr. Nebe testified all of these jobs were within Claimant's physical restrictions and were appropriate for Claimant's return to work. However, on cross-examination, he acknowledged Claimant only had a ninth grade education and is currently taking narcotics. (Tr. 124-126). He stated he had not met Claimant or done any testing on Claimant, and none of these positions have actually been offered to Claimant. On further examination, Mr. Nebe admitted Claimant may have trouble doing some of these jobs due to his need to alternate between sitting and standing, and because he is taking narcotic medications which cause drowsiness. Mr. Nebe stated each individual employer would have their own policies regarding these situations, but he was confident Claimant would be able to work something out. (Tr. 126-127).

The Investigative Evidence

Deep South Investigations, Inc.

Employer submitted the report of Deep South Investigations, Inc. which was received into evidence as EX-11, without objection. (Tr. 6). Deep South Investigations, Inc. is a member of the National Association of Fraud Investigators, United States Process Servers Association and the Louisiana Private Investigative Association. It has also been admitted to the Board of Private Investigators Examiners. (EX-11, p. 6).

Employer hired Deep South Investigations to surveil Claimant. The company had three of its investigators, Mr. Tony Valore, Mr. Mark Avery and Mr. Richard Riddick, follow Claimant on nine different occasions between April 21, 2000 and October 17, 2000. In that time period, the investigators observed Claimant operating, entering and exiting a motor vehicle with no apparent difficulties. Claimant was seen walking with a normal gait as well as running across a street, bending and stooping with no apparent difficulty. The investigators also observed Claimant laughing, conversing and socializing. He never displayed a limited range of motion, nor any outward characteristics of physical impairment or disability. Claimant

was never seen wearing any medical supports or braces. (EX-11, p. 2). On October 17, 2000, Claimant was observed exiting Dr. Phillips' office, walking quickly down the street with his cane. Thereafter, investigators saw him at a drug store, walking with a normal gait and without his cane. (EX-11, p. 5).

The Contentions of the Parties

Claimant contends he injured his lower back in a slip and fall accident at work on December 27, 1999. He argues he sought timely, necessary and proper medical treatment. He further asserts his back pain caused his legs to weaken and, in turn, his weak legs caused him to fall on October 17, 2000, and injure his right knee. Claimant also contends his injury, the litigation and Employer's denial of medical benefits have caused him to relapse into severe depression and substance abuse. He maintains he is physically and mentally unable to return to work in any capacity and Dr. Phillips' label of total disability means he was not released to return to work in any capacity. Claimant further contends he reached MMI on December 6, 2001, and thus, per the Stipulated Order, Employer pre-maturely terminated temporary total disability benefits. Furthermore, since Dr. Phillips did not clarify his disability opinion until March 27, 2002, Claimant contends he is entitled to temporary total disability indemnity benefits from December 6, 2001 to March 27, 2002.

Employer contends Claimant's knee injury and psychiatric problems are not attributable to his back injury, and thus are not work-related. It argues Claimant did not mention knee pain until almost one year after the accident and Dr. Phillips testified he could not relate the knee pain to the back injury. Moreover, Employer asserts Claimant's depression and substance abuse have been present for more than a decade before his accident occurred. It argues Claimant's conflicting testimony, his criminal record and admitted use of illegal drugs render his testimony and arguments incredulous. Employer also contends Claimant reached MMI on June 21, 2001, when Dr. Phillips assigned him permanent work restrictions. It asserts Dr. Phillips released Claimant to work on that date, within certain physical limitations. Employer maintains the job of blast hood and paint swab assembler is well within those restrictions and suitable alternative employment for Claimant.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144

(D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Newman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Employer attacks Claimant's credibility in this matter. It claims his conflicting testimony, admitted use of illicit drugs and criminal record render his credibility tenuous at best.

Claimant offered conflicting testimony regarding his medications and drug usage. He first testified he never took his medications while drinking or taking illegal drugs, later stating he could not remember the last time he did so, but that it was not recently. Claimant further testified he wanted to return to work and knew Employer had a suitable job for him, but could not go back because he had not been released to return to work by his doctor. Although Claimant testified he saw Dr. Phillips' June 21, 2001 report which stated he needed to be retrained for a light duty job, Claimant maintained he was not released to work and, furthermore, Employer had not offered to retrain him. I

further note Claimant told Dr. Phillips he has never been treated for alcohol or drug abuse or psychiatric problems. However, he has been admitted to hospitals repeatedly for such symptoms and presently claims this accident exacerbated his depression and substance abuse.

In view of the foregoing, I conclude that Claimant was not a completely accurate witness, however I do not find his inaccuracies and inconsistencies to be intentionally deceitful. Although Claimant gave inconsistent testimony regarding his drug and alcohol abuse, in all likelihood to conceal it, I nonetheless found his testimony of his accident and injuries was generally unequivocal and credible throughout the formal hearing. I further note no effort was made to clear up any misunderstandings related to Dr. Phillips' disability rating, and Claimant's limited intelligence in that matter does not render his testimony entirely unbelievable. I so find.

Additionally, Dr. Phillips opined Claimant's knee injury could have been caused by the leg weakness and numbness as a residual of his back injury sustained in his work accident. Employer failed to submit medical evidence to the contrary, relying instead on the incomplete, edited testimony of Dr. Phillips. Moreover, Dr. Katz and Dr. Murphy had concurred in Dr. Phillips' opinions regarding Claimant's back injury. Therefore, I find Claimant's testimony to be buttressed by credible, objective and well-reasoned medical opinions. Claimant's complaints have a medical basis and are substantially supported.

While Claimant is not a perfect witness, his errors do not render his testimony completely incredulous. I find his inconsistencies and illegal activities do not undermine the cogent and probative medical opinions of record, further analyzed below, that form the basis of a determination that Claimant suffered a compensable back injury with debilitating residual effects.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of

> a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

The parties do not dispute Claimant fell at work on December 27, 1999, and hurt his lower back. (See JX-1). The nexus between Claimant's knee and psychiatric conditions to his work injury is disputed. Claimant argues the fall onto his right hip and thigh, along with his concomitant lower back injury, resulted in pain, weakness and numbness in his legs. He contends he has complained about his leg pains since his first visit with Dr. Phillips on January 17, 2000, and that such pain and weakness caused him to fall and injure his knee. He argues his knee injury is indirectly related to his work-related back injury. Additionally, Claimant asserts the stress of this situation, including the litigation and suspension of compensation and medical benefits, caused him to relapse into depression and substance abuse. Although he has a long history of these conditions, as well as a criminal record, Claimant states he had cleaned up his life before his work accident and, but for this situation, he would not currently suffer from these mental illnesses and abuses.

Employer contends Claimant's knee injury and psychiatric issues are not related to his work injury. It questions Claimant's credibility, pointing out his inconsistent testimony, illegal drug use and criminal record. Employer argues his psychiatric problems have always been present and have not been exacerbated by this litigation. It emphasizes the fact that

Claimant denied any psychiatric problems to Dr. Phillips, and the doctor never referred him to a psychiatrist or psychologist. Employer also argues Claimant's back injury did not cause harm to his knee.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant testified his back pains caused his legs to become weak, resulting in his knee giving way. Claimant stated when his knee gave out he fell onto and injure his right knee. (Tr. 25-26). Dr. Phillips testified Claimant's back injury more probably than not caused his legs to become weak and intermittently numb. He further testified a bad back could cause a person to fall, because "if your leg is numb it can give way." (EX-17, p. 39). Although Dr. Phillips stated Claimant did not report his knee gave out as a result of his weak legs, he added that Claimant is not a sophisticated person and probably could not report a knee injury particularly well. Dr. Phillips further stated a bad knee or a bad back could have caused Claimant's fall. (EX-17, p. 44).

Claimant also testified his injuries, this litigation and Employer's denial of compensation and medical benefits have caused him to revert into depression and substance abuse. This, in turn, has resulted in liver problems and multiple run-ins with law enforcement. Claimant admits he has suffered from these psychiatric problems for the past sixteen years but contends he had cleaned up his life before his work accident occurred. Claimant has produced no medical evidence suggesting his accident triggered his depression and substance abuse. He never mentioned his depression to Dr. Phillips nor requested a psychiatric referral. Dr. Phillips' reports indicate Claimant stated he had no history of mental illness or psychiatric problems and Claimant denied any new occurrences of the same.

I did not find Claimant to be a completely incredible witness, but his testimony regarding his drug abuse and mental conditions was inconsistent and he offered no medical evidence to support his argument. Therefore, I find he has failed to establish a **prima facie** case that his work accident could have resulted in his depression and substance abuse. The evidence and testimony are insufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252

(1988).

However, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain to his legs and lower back on December 27, 1999, which could have caused his knee to give way, resulting in his fall and subsequent right knee injury. Thus, he established that his working conditions and activities on that date could have directly caused him low back and leg pain which indirectly resulted in harm or pain in his right knee sufficient to invoke the Section 20(a) presumption. Cairns, supra.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, as here, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

In the present matter, Employer has not submitted any medical reports or opinions to rebut the testimony of Dr. Phillips that Claimant's work accident more probably than not caused his knee injury. Employer instead relies on Dr. Phillips' previous statements that he could not relate Claimant's knee injury to his work accident. Claimant does not claim he directly injured his knee in December 1999, and Dr. Phillips later clarified that the accident could have indirectly caused the knee

injury. Employer has not provided any evidence to the contrary, and, therefore, it has not rebutted Claimant's **prima facie** claim.

3. Conclusion

In conclusion, I find Claimant's work accident directly caused him pain in his lower back, and weakness and numbness in his legs. These injuries, in turn, caused Claimant's right knee to give way, resulting in a fall which injured his right knee. Dr. Phillips testified Claimant's weak and intermittently numb legs could have caused this fall. As Employer has not submitted evidence to the contrary, I find that Claimant's knee injury is indirectly related to his work accident and thus is compensable.

However, Claimant failed to establish a **prima facie** case that his depression and substance abuse were either directly or indirectly related to his work accident. Therefore, these conditions are not compensable under the Act.

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co.

v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Dr. Phillips has diagnosed Claimant as temporary totally disabled since his first examination in January 2000. As early as August 2000, he stated Claimant would not be able to return to his former job of painter and sandblaster. On June 21, 2001, Dr. Phillips reported Claimant was permanently totally disabled from heavy manual labor. He testified Claimant reached MMI on December 6, 2001, when he decided Claimant was not a candidate for surgery. Claimant thus contends December 6, 2001, is the correct date of MMI. However, MMI occurs when a claimant's condition stabilizes and, in the present matter, Claimant's condition stabilized much earlier than December 6, 2001. It essentially did not change throughout his two years of treatment with Dr. Phillips. Dr. Phillips' June 21, 2001 opinion that Claimant is permanently totally disabled from heavy manual labor and assignment of permanent restrictions which never changed thereafter indicates that Claimant's condition reached stability at that time. I conclude Claimant's condition remained the same through the present, therefore the earlier date of June 21, 2001, rather than December 6, 2001, more reasonably reflects a plateauing of his medical condition. Thus, I find Claimant attained MMI, and permanent disability, on June 21, 2001.

The Stipulated Facts and Order signed by the District Director on May 9, 2001, states that Employer shall be liable for temporary total disability compensation payments until Claimant reaches MMI. (CX-11, p. 2). Employer paid Claimant total temporary disability compensation through September 11, 2001. (CX-10). As I find Claimant attained MMI on June 21, 2001, it follows that Employer has not violated the Stipulated Facts and Order of May 9, 2001, but instead over compensated Claimant by eleven and one-half weeks.

In his June 21, 2001 report, Dr. Phillips stated Claimant was totally disabled from heavy manual labor and needed to be retrained for light duty work. Specifically, Claimant's back injury prevented him from repetitive bending, stooping and lifting over 20 pounds. Dr. Phillips maintained these restrictions through his February 28, 2002 report and continuing. Thus, while indicating Claimant could return to work in some diminished capacity, Dr. Phillips determined Claimant could not return to his former position as a painter and sandblaster because of his work-related back injury. Therefore, Claimant has established a **prima facie** claim of total disability.

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special**

skills which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

"An employer's offer of a suitable job within the partially disabled claimant's current place of work is sufficient to discharge its burden of establishing suitable employment." Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 688 (5th Cir. 1996). Such a job is suitable alternative employment if it is tailored to the claimant's physical restrictions and the work is necessary, not sheltered, employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224, 226 (1986). If employer can identify suitable alternative employment within its own operation, it "need not show that the claimant can earn wages in the open market." Darby, supra, at 688.

In the present matter, Employer claims it has identified suitable alternative employment within its operation for Claimant as a blast hood assembler and paint swab maker. Although reserved for Employer's worker's compensation program, I conclude this position is not sheltered employment and is necessary for the daily operation of Employer's paint department.

This position would require Claimant to sit or stand at a workstation and either duct-tape a plastic shield onto a blast hood or attach cotton material to the end of a 12-inch metal rod. The physical demands of the position conform to Dr. Phillips' restrictions of no repetitive bending, stooping or lifting more than 20 pounds. Claimant may alternate between sitting and standing and may take breaks as needed. Lifting is under 5 pounds and he would not have to walk more than 15 yards to use the restroom. Furthermore, Claimant would receive the same wages he was earning when he injured himself in November 1999.

This position was reviewed by two vocational rehabilitation counselors, who both found it to be suitable employment for

Claimant. Additionally, Employer's paint superintendent and medical services administrator testified to the accuracy of the job description. Each confirmed the job description was within Dr. Phillips' restrictions and Claimant would earn the same wages he was earning at the time of his accident. Furthermore, there is no special training required beyond on-the-job demonstrations. This position of blast hood assembler and paint swab maker is well within Dr. Phillips' restrictions as well as Claimant's physical and mental capabilities. Therefore, Employer has sufficiently established employment for Claimant which he is mentally and physically capable of performing. I so find.

Employer offered Claimant a position as a blast hood assembler and paint swab maker following Dr. Phillips' June 21, 2001 report. Employer scheduled Claimant's return to work for September 10, 2001, but Claimant failed to report to work because he claimed Dr. Phillips had not yet released him to do so.

Dr. Phillips' June 21, 2001 report stated Claimant was permanently totally disabled from heavy manual labor and needed to be retrained for lighter duty employment. Although the report mentioned Claimant was temporarily totally disabled, its details indicated Claimant was cleared for light duty work. On September 13, 2001, Dr. Phillips clarified Claimant is permanently partially disabled. (EX-17, p. 50). However, I find this clarification redundant of his June 21, 2001 report that Claimant was permanently totally disabled from heavy manual labor. No clarification of this report was sought. Claimant was cleared for light duty work in June 2001, and Employer's position of blast hood assembler and paint swab maker fits within Dr. Phillips' physical restrictions placed on Claimant. This position was offered to Claimant, and currently remains available to him.

Thus, Employer identified employment which Claimant is physically and mentally capable of performing, and such employment was offered and is still available to Claimant. Therefore, I find the position of blast hood assembler and paint swab maker to be suitable alternative employment under the Act. Having so found, I further find it unnecessary to evaluate the outside jobs identified in Mr. Nebe's labor market survey.

The burden thereafter shifted to Claimant to demonstrate that he tried with reasonable diligence to secure such employment and was unsuccessful. Claimant has presented no evidence of his efforts and has thus failed to show diligent search to secure such suitable alternative employment.

Employer's suitable alternative employment would pay

Claimant the same wages he was earning at the time he was injured. Therefore, he no longer incurred any loss of earning capacity as of September 10, 2001, and is not thereafter entitled to compensation. I so find.

In view of the foregoing, I find Employer shall pay Claimant temporary total disability compensation for the period from December 27, 1999 to June 21, 2001, when Claimant achieved MMI. Employer shall also pay Claimant permanent total disability compensation from June 21, 2001 to September 10, 2001, the date Employer established suitable alternative employment. As of September 10, 2001, Claimant is permanently partially disabled in view of the suitable job opportunity at Employer's facility and, as he suffered no loss of earning capacity, he is not entitled to further compensation.[2]

F. Entitlement to Medical Care and Benefits

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

In the present case, Claimant immediately sought treatment from Dr. Mabey before seeking treatment from a specialist, Dr. Phillips, on a regular and continuous basis. Dr. Phillips treated Claimant in a conservative manner, recommending physical therapy and medication before ordering an MRI or any other diagnostic tests. He followed Claimant's progress for almost two years before determining Claimant was not a candidate for surgery. The only interruption to Claimant's treatment from Dr. Phillips was Claimant's financial difficulties and inability to obtain medical clearance from Employer. Dr. Phillips acknowledged in his reports that Claimant had been denied conservative and necessary treatment. Medical records indicate

---

[2] Since Claimant is deemed permanently totally disabled from June 21, 2001 to September 10, 2001 only, he is not entitled to a wage inflation adjustment under Section 10(f) of the Act.

Claimant visited the emergency room on January 5, 2000, February 23, 2000 and January 8, 2001, because he could not afford to see Dr. Phillips in the absence of Employer's medical authorization.

Dr. Katz agreed with Dr. Phillips' initial three-week physical therapy regime, and felt Claimant needed to be reassessed at the end of that period. In July 2000, Dr. Murphy examined Claimant at the request of the Department of Labor and opined a lumbar MRI was overdue. Neither of these doctors found Dr. Phillips' treatment of Claimant unnecessary or unreasonable and they each rendered opinions consistent with Dr. Phillips.

In the present matter, Employer has been found liable for Claimant's December 27, 1999 lower back work injury and its knee residuals. Accordingly, Employer is responsible for all reasonable and necessary medical expenses related to Claimant's back and knee injuries.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer voluntarily paid Claimant temporary total disability compensation from December 27, 1999 to September 11, 2001, based on the stipulated compensation rate of $369.07. It filed notices of controversion on January 31, 2000 and February 23, 2000. The Stipulated Facts and Order of May 9, 2001, required Employer to pay Claimant temporary total disability compensation until he reached MMI. I find Employer fulfilled its obligations under the Stipulated Facts and Order and filed timely notices, therefore no penalty for payment of compensation under Section 14(e) of the Act attached.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins

v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee
award for services rendered after **October 11, 2001,** the date this matter was referred from the District Director.

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from December 27, 1999 to June 21, 2001, when he reached MMI, based on Claimant's average weekly wage of $553.60, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from June 22, 2001 to September 10, 2001, when suitable alternative employment was established, based on Claimant's average weekly wage of $553.60, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 27, 1999 work injury, including expenses associated with his back and residual knee conditions but not his alleged psychiatric condition, pursuant to the provisions of Section 7 of the Act.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 25th day of July, 2002, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge